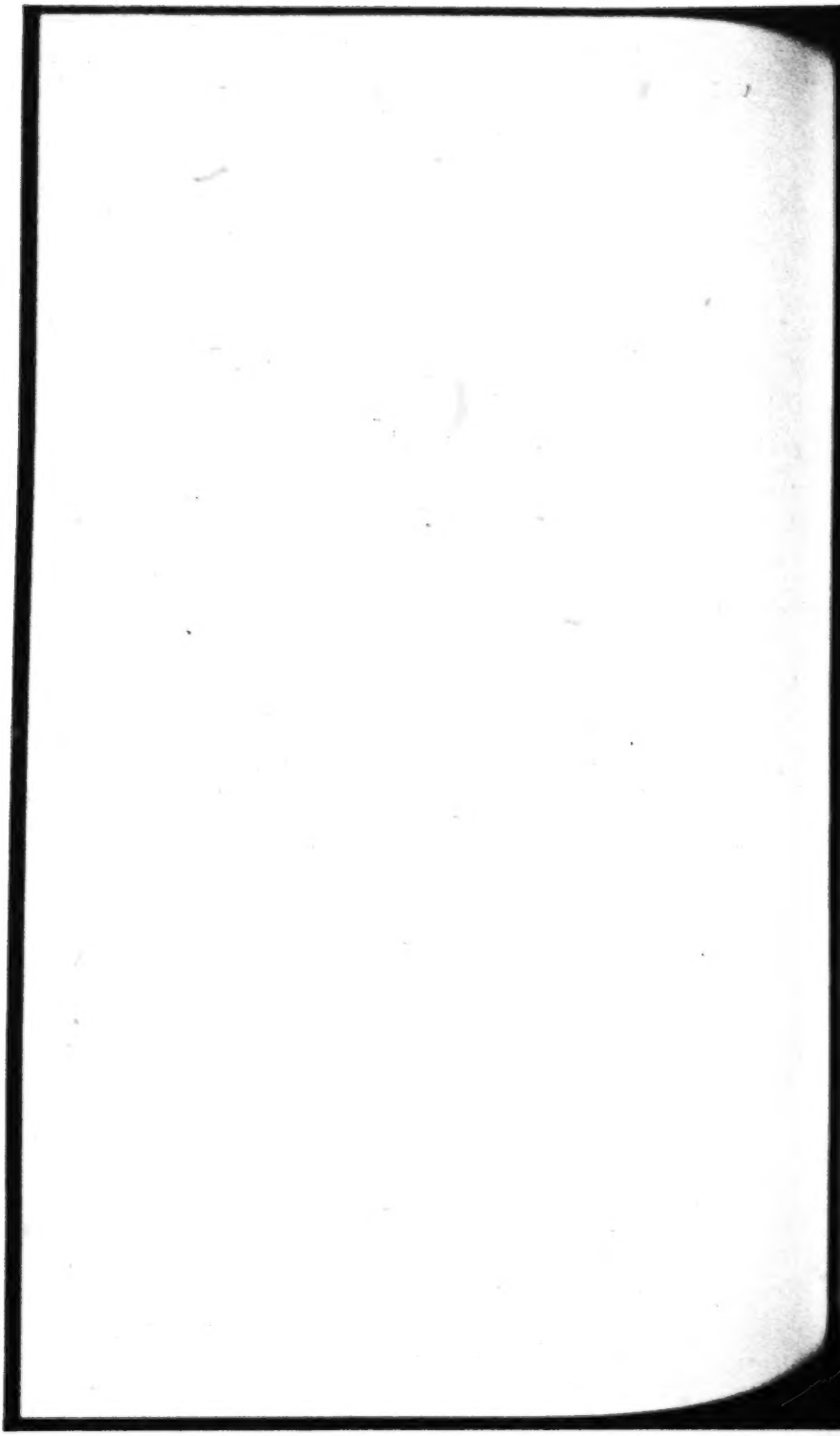


SUBJECT INDEX

	Page
Jurisdictional Statement	1
Preliminary Statement	1
Contentions of Amicus State of California	3
Argument	4
The District Court's Holding That the Florida Act Unlawfully Intrudes Into Exclusive Federal Admiralty Domain Is in Error	4
A. The Florida Statute Does Not Unlawfully Intrude Upon Maritime Jurisdiction..	4
B. The Federal Maritime Power Does Not Entirely Preclude State Legislation in Areas of Maritime Activities	5
C. Mere Differences Between State and Federal Legislation on the Same Subject Matter Do Not Require Invalidation of the Former	9
D. Congress Did Not Preempt the Field of Water Pollution Control by Enacting the Water Quality Improvement Act	12
Conclusion	15

TABLE OF AUTHORITIES CITED

Cases	Page
American Waterways Operators, Inc. v. Askew, 335 F.Supp. 1241 (M.D. Fla. 1971)	4
Druker v. Sullivan, 322 F.Supp. 1126 (D. Mass. 1971)	14
Fitzgerald v. A. L. Burbank & Co., 451 F.2d 670 (2d Cir. 1971)	8
Helvering v. Griffiths, 318 U.S. 371 (1943)	6
Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc., 306 F.2d 369, mod. 308 F.2d 570 (5th Cir. 1962)	6
Huron Cement Co. v. Detroit, 362 U.S. 440 (1960)	7, 11, 13
Jarka Corporation v. Hellenic Lines, 182 F.2d 916 (2d Cir. 1950)	6
Just v. Chambers, 312 U.S. 383 (1941)	8, 10
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	7
Morgan's Steamship Company v. Louisiana Board of Health, 118 U.S. 455 (1866)	5
Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971)	12
Petition of United States Steel Corporation, 436 F. 2d 1256 (6th Cir. 1970), cert. denied sub. nom. Cook, Administratrix v. United States Steel Corp., 402 U.S. 987 (1971)	8
Skiriotes v. Florida, 313 U.S. 69 (1941)	7, 15
Sorensen v. City of New York, 202 F.2d 857 (2d Cir. 1953), cert. denied 347 U.S. 951 (1954)	6
Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917)	5, 6, 7

Page

Standard Dredging Co. v. Murphy, 319 U.S. 306 (1943) 6

State Department of Fish and Game v. S.S. Bournemouth, 307 F.Supp. 922 (C.D. Cal. 1969) 10

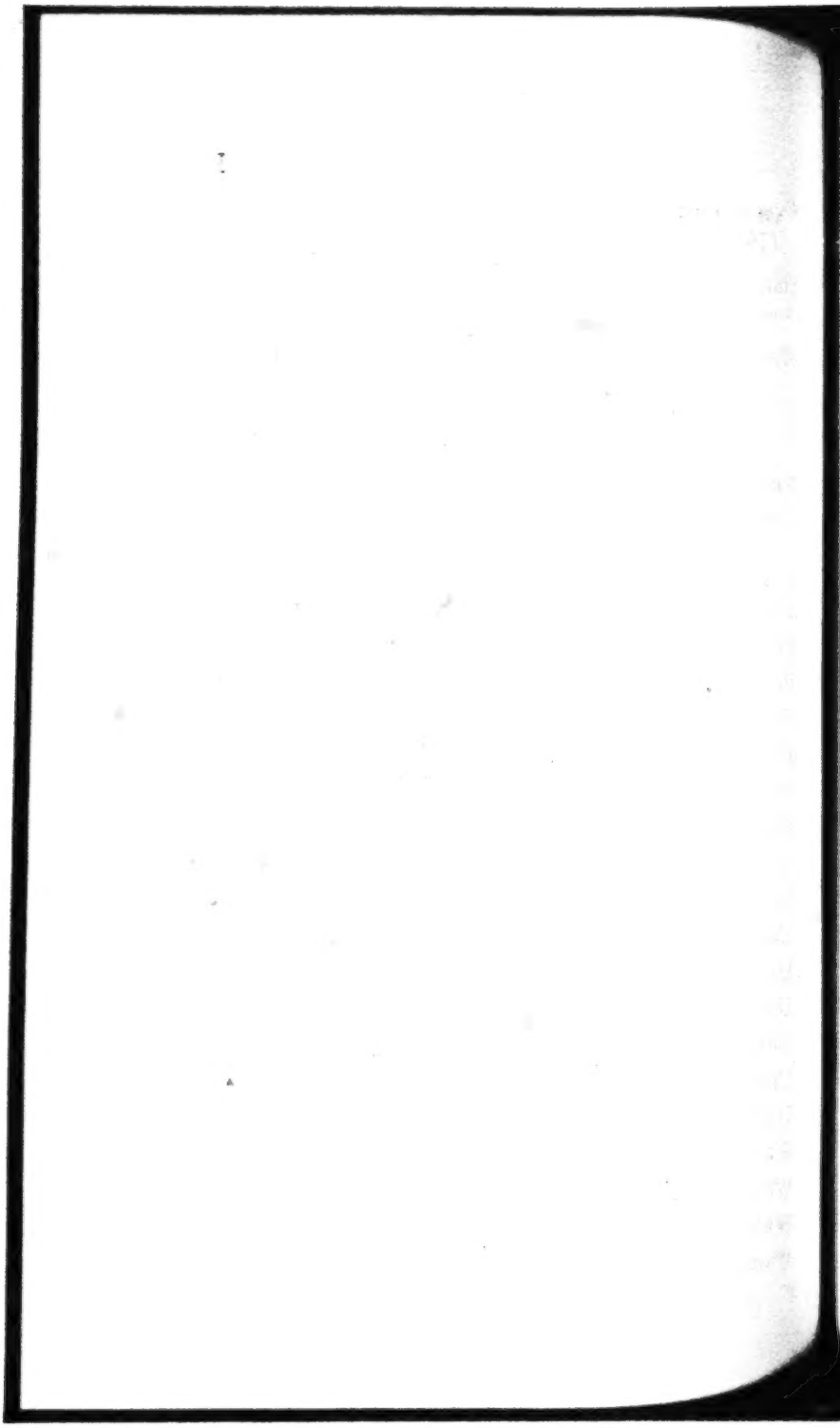
Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952) 6

Rules

Rules of Supreme Court of the United States, Rule 42(4) 1

Statutes

Fish and Game Code, Sec. 5650 2
Fish and Game Code, Sec. 5651 2
Florida Act, Chap. 70-244 2
Florida Act, Chap. 70-244, Sec. 11(6(c) 10
Florida Statutes Annotated, Chap. 376 2
Harbors and Navigations Code, Sec. 133 2
Harbors and Navigations Code, Sec. 151 2
United States Code, Title 28, Sec. 1253 1
United States Code, Title 33, Sec. 1161 9
United States Code, Title 33, Sec. 1161(f) 10
United States Code, Title 33, Sec. 1161(o) 13, 14
United States Code, Title 43, Sec. 1311 14
United States Code, Title 43, Sec. 1311(a) 14
United States Code, Title 43, Sec. 1333 15
United States Constitution, Art. III, Sec. 2 ....2, 4, 11
Water Code, Sec. 13243 2
Water Code, Sec. 13263 2
Water Code, Sec. 13304 2
Water Code, Sec. 13350 2



IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1082

REUBIN O'D ASKEW, *et al.*,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS, INC., *et al.*,

Appellees.

Brief of the Attorney General of the State of California as Amicus Curiae in Support of Appellants Askew, State of Florida, et al

Jurisdictional Statement

This Honorable Court has noted probable jurisdiction in this appeal by the State of Florida, in the name of the State, its Governor and other state officials and agencies, from a judgment of the United States District Court for the Middle District of Florida. 28 U.S.C. § 1253. This brief, *amicus curiae,* is respectfully submitted by the State of California, by and through its Attorney General, pursuant to Rule 42(4) of this Honorable Supreme Court of the United States.

Preliminary Statement

The State of California has a vital interest in all questions having to do with water and water quality. Not only is California the largest State of the Union in terms of population, its western boundary includes

more than one-half of the Pacific Ocean coastline of the continental United States. Further, at San Diego Bay, Los Angeles-Long Beach and San Francisco Bay, it boasts the nation's three most important international harbors on the Pacific Coast. California's resources in beaches, sea life and coastal waters are known worldwide.

The California legislature has enacted provisions of law which allow state agencies such as the California Department of Fish and Game, the State Water Resources Control Board, the nine Regional Water Quality Control Boards, and the Attorney General of California to assert the interests of the state and its people when incidents of water pollution occur.[1]

Thus, California has an essential interest in having the constitutional power to act in areas concerning pollution of the waters of its shores. Any holding of this Court which denies or limits that power would critically injure the State's ability to safeguard the public health, safety and welfare by regulating threats of marine pollution.

In this case, the District Court declared Chapter 70-244 of the Laws of Florida (as amended, ch. 376, Fla. Stats. Ann.) [hereinafter referred to as the "Florida Act."] unconstitutional for violation of Article III, section 2 of the federal Constitution. California submits this brief *amicus curiae* on behalf of appellants, and respectfully prays that the judgment of the District Court be reversed. In so doing we support the positions set forth in the brief submitted herein by

---

[1]*See* Harbors and Navigations Code sections 133 and 151, Fish and Game Code sections 5650 and 5651, and Water Code sections 13304, 13243, 13263 and 13350.

the Honorable Attorney General of the State of New York on behalf of that State. In addition we respectfully present the following argument.

Contentions of Amicus State of California

The District Court's holding that the Florida Act unlawfully intrudes into exclusive federal admiralty domain is in error. The states do have the authority to enact legislation in order to prevent and ameliorate pollution of the waters within their jurisdictions.

A. The Florida Act does not unlawfully intrude upon maritime jurisdiction.

B. The federal maritime power does not entirely preclude state legislation in areas of maritime activities.

C. Mere differences between state and federal legislation on the same subject matter do not result in invalidation of the former.

D. Congress did not preempt the field of water pollution control by enacting the Water Quality Improvement Act.

ARGUMENT

The District Court's Holding That the Florida Act Unlawfully Intrudes Into Exclusive Federal Admiralty Domain Is in Error

The District Court held herein that the Florida statute unlawfully intruded into "the exclusive federal admiralty domain." [Opinion, p. 1246[2]]. The Court held that the Florida statute was invalid because a state may not legislate within the admiralty jurisdiction. [Opinion p. 1248.] The Court also stated that the Florida statute was invalid because it attempted to "change substantive maritime law" [Opinion, p. 1246], and was "in contravention with general admiralty rules or congressional enactments in the maritime field." [Opinion, p. 1248].

As will be shown below, each of the District Court's propositions is wrong. Further, they are inconsistent.

A. The Florida Statute Does Not Unlawfully Intrude Upon Maritime Jurisdiction

The District Court decided without comment that the Florida Act was of a subject matter within the realm of maritime jurisdiction. Although Article III, section 2, of the Constitution merely states that the judicial power of the United States extends "to all cases of admiralty and maritime jurisdiction," the Court states without citation that maritime law "governs virtually every facet of the shipping industry." [Opinion, p. 1245].

The Florida Act, however, is not a law governing the shipping industry, and does not seek to regulate in-

---

[2]The District Court opinion herein is reported as *American Waterways Operators, Inc. v. Askew*, 335 F.Supp. 1241 (M.D.Fla. 1971). Citations thereto in this brief shall be as follows: "Opinion p. ....."

ternational or interstate sea traffic, although it does of necessity impose certain requirements upon vessels. The Florida Act is a valid exercise of the state's police power, in that it serves to advance the public health, welfare and safety. That the Florida Act does so is apparent on its face—it combats pollution of waters caused by oil. There can be no doubt that oil pollution endangers the public health, welfare and safety. Further, there can be no doubt that a state may exercise its police power to eradicate such dangers to its beaches, shoreline and coastal waters. This Court has upheld state police power statutes which had incidental effects upon maritime activites. *See e.g., Morgan's Steamship Company v. Louisiana Board of Health,* 118 U.S. 455 (1866) [Upholding state requirement that all vessels approaching New Orleans be inspected for yellow fever and cholera, and that such vessels pay an inspection fee.]

B. The Federal Maritime Power Does Not Entirely Preclude State Legislation in Areas of Maritime Activities

As noted, the District Court held that the Florida Act unlawfully intruded into "the exclusive federal admiralty domain." [Opinion, p. 1246]. The Court's holding therefore rests upon the conclusions that states are entirely precluded from acting in maritime areas. Assuming *arguendo* that the Florida Act is within admiralty subject matter, we shall demonstrate below that the District Court's holding does not correctly state the law.

In holding that the states may not legislate within the admiralty jurisdiction, the District Court relied primarily upon what it terms a "landmark" case, *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917),

in which this Court held that recovery was not available under a state's workman's compensation act for injuries incurred within the realm of the maritime jurisdiction. [Opinion, p. 1248]. *Jensen,* however, is anything but a landmark. It has been severely restricted as a viable precedent. Thus, in *Helvering v. Griffiths,* 318 U.S. 371, 399-400 (1943), this court termed the decision in *Jensen* "a much criticized and somewhat impaired, but not overruled, decision." In *Standard Dredging Co. v. Murphy,* 319 U.S. 306, 309 (1943), this Court stated that the *Jensen* decision "has no vitality beyond that which may continue as to state workman's compensation laws." *See also, Jarka Corportion v. Hellenic Lines,* 182 F.2d 916, 919 (2d Cir. 1950). Criticism from the Courts of Appeal has been abundant over the years. *See e.g., Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.,* 306 F.2d 369, 371 modified on other grounds, 308 F.2d 570 (5th Cir. 1962); *Sorensen v. City of New York,* 202 F.2d 857, 859-60 & n. 11 (2d Cir. 1953); *cert. denied* 347 U.S. 951 (1954); *Western Boat Bldg. Co. v. O'Leary,* 198 F.2d 409, 413-14 (9th Cir. 1952).

Thus, it cannot be said that the *Jensen* case is the significant authority the District Court believed it to be. In fact it appears that the law is quite contrary to the District Court's opinion:

> ". . . In the exercise of [the police power], the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations.]"

Huron Cement Co. v. Detroit, 362 U.S. 440, 442 (1960). That this is the law was even recognized by the Court in the *Jensen* opinion:

> ". . . [I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*" (Emphasis added.) *Southern Pacific Co. v. Jensen, supra,* 244 U.S. 205, 216 (1917).

This Court has upheld state and local police power statutes and ordinances which arguably were maritime in nature. *See, e.g., Huron Cement Co. v. Detroit, supra,* 362 U.S. 440 (1960) [Upholding ordinance regulating vessel smoke discharges]; *Skiriotes v. Florida,* 313 U.S. 69 (1941) [Upholding state regulation of offshore fisheries even though such state regulation might be enforced in navigable waters within admiralty jurisdiction].

Therefore, the District Court herein clearly was in error in boldly stating that the states may not act in areas of admiralty and maritime activities.

The District Court also rejected the contention that state law may fill "gaps" in maritime law by citing *Moragne v. States Marine Lines,* 398 U.S. 375 (1970) as "clearly put[ting] such a theory to rest." [Opinion, p. 1249]. That decision does no such thing. In *Moragne,* this Court removed a festering thorn from the corpus of admiralty law which for decades had denied recovery from wrongful death by a next of kin

of a decedent killed as a result of a maritime tort. By now allowing such a cause of action in admiralty, this Court merely eliminated the necessity for the exception which had developed whereby next of kin were able to recover under state law if the injury occurred within a state where a cause of action for wrongful death was available. *Petition of United States Steel Corporation*, 436 F.2d 1256, 1278 (6th Cir. 1970), *cert. denied sub. nom. Cook, Administratrix v. United States Steel Corp.*, 402 U.S. 987 (1971).

> "The decision in *Moragne* was primarily concerned with the *lack* of an admiralty remedy for wrongful death within American territorial waters. . . . Before *Moragne*, however, anyone killed within a marine league of the United States was *forced* to rely on the state law for any unseaworthiness claim which he might have." (Emphasis added.) *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 683 (2d Cir. 1971).

Therefore, this Court's decision in the *Moragne* case has been employed inappositely by the District Court herein. The applicable law as to the avilability of state remedies in admiralty continues to be what this Court stated in *Just v. Chambers*, 312 U.S. 383, 388 (1941):

> "[T]he State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

C. Mere Differences Between State and Federal Legislation on the Same Subject Matter Do Not Require Invalidation of the Former

The District Court was greatly influenced in its decision by its belief that several provisions of the Florida Act differed in content from the provisions of the federal Water Quality Improvement Act, 33 U.S.C. § 1161 *et seq.*, [Opinion, pp. 1245-47] and would impermissibly attempt to "change substantive maritime law." [Opinion, p. 1246]. The Court held the Florida Act invalid because it was "in contravention with general admiralty rules or congressional enactments in the maritime field." [Opinion, p. 1248].

Initially, it should be noted that the District Court's opinion is not only wrong, but is inconsistent as well. If the Court believed that the states cannot act at all within maritime areas, then it would be compelled to void *all* state enactments, regardless of whether they might "contravene" federal maritime law. Here, however, after stating that the states may not act, the District Court goes on to note the alleged "contraventions" of federal law by the Florida Act.

Leaving the above noted inconsistency aside, it is obvious in any case that the Court's proposition is wrong as well.

Although there are differing provisions in the Florida Act and Water Quality Improvement Act (W.Q.I.A.), the Florida Act neither "changes" nor is it "in contravention" of federal maritime law. Rather, the Florida Act is consistent with and permissibly supplemental to the W.Q.I.A. The District Court noted that the federal act excuses liability for oil spills caused by acts of God, acts of war or fault of third parties. However, the Flor-

ida Act also excuses liability in the same manner as does the W.Q.I.A. The Florida Act explicity permits the person determined to be liable to obtain reimbursement if the state finds the occurrence was the result of any of these events. Ch. 70-244, § 11(6)(c), Laws of Florida. And, while the Florida Act imposes liability for cleanup costs upon the polluter without the monetary ceiling created by the Federal statute, there is nothing in the W.Q.I.A. or elsewhere in federal law which prohibits the states from going further than the limited liability set forth in the federal act. 33 U.S.C. § 1161(f). The same is true as to remedies for damages caused by discharges other than cleanup costs. There is nothing in the Constitution or any federal law which would deprive the states of authority to provide for liability for damages occasioned by an oil spill without the necessity of proving negligence, so long as such liability is only for damages incurred within the jurisdiction of the state. *See, e.g., State Department of Fish and Game v. S.S. Bournemouth,* 307 F. Supp. 922 (C.D. Cal. 1969).

Thus, the Florida Act neither changes nor contravenes federal law. Rather, the Florida Act permissibly supplements and may properly exist side by side with the W.Q.I.A. As we have indicated previously, this court has made it clear that the states are authorized to enact such legislation.

> "[T]he State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers,* 312 U.S. 383, 388 (1941).

In addition, it is not the law that mere differences between federal and state statutes require the state statutes to fall. As this court recently stated:

> "In the exercise of [the police power], the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government. [Citations.]
>
> ". . . .
>
> "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action [citations]. . . .
>
> "In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' [Citations.]" *Huron Cement Co. v. Detroit,* 362 U.S. 440, 442, 443 (1960).

As demonstrated earlier in this brief, Florida was not precluded by Article III, Section 2, of the Constitution, from enacting the challenged Act. The mere fact that the federal and state provisions on the same or similar subject might be different does not require invalidation of the state law unless the federal provisions serve to preempt the field and for that reason alone preclude all state legislation in that area. Although the District Court did not discuss preemption, we shall demonstrate below that the W.Q.I.A. does not work a preemption of the state's power to legislate.

D. Congress Did Not Preempt the Field of Water Pollution Control by Enacting the Walter Quality Improvement Act

In a recent opinion, the Court of Appeals articulated three tests for preemption.

1. Is compliance with both State and Federal law impossible? " 'A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility.' [Citing *Florida Avocado & Lime Growers Assn. v. Paul,* 373 U.S. 132, 142-43 (1963)];"

2. Did Congress expressly declare preemption? Did Congress manifest an intent to displace coincident state regulation in a given area? If Congress has unequivocally and expressly declared that the authority conferred by it shall be exclusive, then there is no doubt that states cannot exert concomitant or supplemental regulatory authority over the identical activity;

3. Is there implied preemption? This may be determined from the aim and intent of Congress, the pervasiveness of the federal scheme, the nature of the subject matter—and whether exclusive federal regulation is demanded in order to achieve vital uniformity; whether state law is an obstacle to accomplishment of Congress' purposes and objectives. *Northern States Power Company v. State of Minnesota,* 447 F.2d 1143, 1146 (8th Cir. 1971).

Applying the above tests to this case, first, we note there has been no contention that compliance with both the W.Q.I.A. and the Florida law is impossible. The mere fact that some provisions of state law might be different from federal provisions does not of itself void the state provisions unless compliance with one necessarily requires a violation of the other.

Second, Congress did not expressly declare preemption either by manifesto or intent. In fact, Congress expressly permitted and impliedly invited the states to impose additional requirements or liabilities. 33 U.S.C. § 1161(o).[3] It may be noted at this point the District Court's statement that Congress cannot "confer on the states" authority to legislate in matters maritime [Opinion, p. 1249] is both wrong and off target. The power of the states to so legislate regardless of Congress has been affirmed by this court more recently than the authority cited by the District Court. *Huron Cement Co. v. Detroit, supra,* 362 U.S. 440, 442 (1960). In addition, since Congress has the power to change the common law of admiralty, it has the power to enlarge the areas for legislation available to the states. As the District Court stated, the corpus of maritime law includes common law and congressional enactments. The court notes that Congress may effect changes in maritime law. [Opinion, pp. 1245, 1248]. Thus, Congress *may* by special enactment specifically allow the states to enact their own laws in an area which might be regarded as maritime. This was done by Congress in the W.Q.I.A. 33 U.S.C. § 1161(o).

---

[3]That section provides:

"(*o*) (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

"(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

"(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal de-

(This footnote is continued on next page)

Third, there has not been implied preemption. Notwithstanding the holding of the District Court, exclusive federal regulation is not demanded by the nature of the subject matter or the Congressional purpose. As stated, the declared aim and intent of Congress was to not preempt. *See* 33 U.S.C. § 1161(o). This same subdivision also demonstrates that Congress did not contemplate state law to be an obstacle to the purposes of the W.Q.I.A. Contrary to the holding of the District Court, it is clear that the W.Q.I.A. does not preempt the area and that there is room for state regulations when such regulations can be enforced without impairing the enforcement of the federal enactment. *Druker v. Sullivan,* 322 F.Supp. 1126, 1129 (D.Mass. 1971).

Moreover, there are other considerations which compel the conclusion that the W.Q.I.A. does not work a congressional preemption precluding state legislation. Such preemption would completely negate the right of the states to enact statutes to protect their territorial waters and the natural resources therein from irreparable damage caused by the discharge of oil into such waters. The federal Submerged Lands Act of 1953, 43 U.S.C. § 1311, et seq., granted the states title and exclusive jurisdiction in the submerged lands from the shoreline to the three-mile limit. The states are expressly granted not only the right and power to manage, administer, lease, develop, but also the use *and natural resources* of such submerged lands. 43 U.S.C. § 1311(a). By necessary implication, such right and

---

partment, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

power must include the right, if not a duty, to *protect* such lands from pollution. That Congress recognized this right and duty is evidenced by that provision of the Submerged Lands Act which provides that the states and the federal government have concurrent jurisdiction to enforce their respective civil and criminal law over such submerged lands. 43 U.S.C. § 1333. In addition, the courts have long recognized the rights of states to legislate in protection of the fisheries upon which the coastal states so heavily depend, even though such state regulation might be enforced in navigable waters within admiralty jurisdiction. *See, e.g., Skiriotes v. Florida,* 313 U.S. 69, 74, 79 (1941).

Conclusion

For the foregoing reasons, it is respectfully requested that the judgment of the District Court be reversed and that this Court reaffirm the right of a state to enact legislation to combat water pollution to protect its coastal resources and for the health and welfare of its people.

EVELLE J. YOUNGER,
Attorney General,

JAY L. SHAVELSON,
Assistant Attorney General,

CARL BORONKAY,
JEFFREY C. FREEDMAN,
Deputy Attorneys General,

Amicus Curiae.